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No. 73-448

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JAROLD WILLIAM SLACK A/K/A
BILLY J. BUDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that there was insufficient probable cause for his arrest without a warrant.

After a jury trial in the United States District Court for the District of Alaska, petitioner was convicted on four counts of aiding and abetting a bank robbery, conspiracy, and possession of a firearm by a convicted felon, in violation of 18 U.S.C. 371 and 2113(a) and (d), and 18 U.S.C. App. 1202(a)(1). He was sentenced to concurrent terms of twelve years on Count I, five years on Count II, and two years each on Counts III and IV; he was also fined $2,500 on Count I. The court of appeals affirmed (Pet. App. A).

At about 5:00 p.m. on June 16, 1971, a bank in Anchorage, Alaska was robbed by two disguised men (petitioner's co-defendants, Shaw and Snyder) carrying guns and a

plastic bag (Tr. 193-194). The two men were seen abandoning the getaway car in the area of a new housing project (Tr. 536-537, 542, 609). Earlier that afternoon, Shaw had been seen in the area of the same housing project driving a green Checker station wagon, which belonged to petitioner (Tr. 516-518, 1015). Petitioner spent most of the afternoon with his son and daughter, and for a period of time in the late afternoon he parked in a new subdivision where houses were being built, and where the two children played for quite some time (Tr. 312-313, 636-637). Petitioner had a minor automobile accident at 5:22 p.m., at a place within 16 minutes' drive of the subdivision where Shaw and Snyder abandoned the getaway car (Tr. 633, 642, 1864).

Disguises identical to those worn by the bank robbers were purchased around noon on the day of the robbery by a boy and a girl whose appearance was similar to that of petitioner's children and who were believed to be petitioner's children (Tr. 457, 462, 485, 491). Guns similar to those used in the robbery were purchased by petitioner at two gun shops (Tr. 1010-1020, 1171, 1178-1180, 1307-1309).

Petitioner, Shaw and Snyder were known to be close associates during the period before and after the bank robbery (Tr. 1360, 1015). A few days after the bank robbery, the three men traveled together under assumed names by automobile from Anchorage to Valdez, Alaska, by ferry from Valdez to Cordova, Alaska, and by Alaska Airlines from Cordova to Seattle, Washington (Tr. 1062, 1071, 1137-1140, 1084, 1092-1093, 1126). Before leaving Anchorage, Shaw had made statements to an associate about having "pull[ed] a federal job," and "going outside to make a hit" (Tr. 1349, 1355). Petitioner had

told this same person about his automobile accident, which occurred shortly after the robbery, and its investigation by a police officer. In doing so he said, "There I stand with [masks and] everything in my trunk, talking to a policeman" (Tr. 1352-1354).[1]

On the basis of information received from the Anchorage F.B.I. office, F.B.I. agents were waiting to apprehend petitioner, Shaw, and Snyder at the Seattle-Tacoma International Airport on the night of June 25, 1971 (Tr. 1203-1204). They had arrest warrants for Shaw and Snyder and a picture of petitioner (Tr. 1203, 1206). They heard someone paging Shaw and proceeded to the gate where the page was being made. A man by the name of Budson was pointed out to them as the person who had made the page and, after comparing the man to petitioner's picture, the agents determined that it was petitioner (Tr. 1206). They watched petitioner for about five minutes, during which time he appeared jittery, walking in and out of a lounge and looking around (Tr. 1206-1207). Agent Reap, who was not then watching petitioner, was called to the scene, advised of the observation of petitioner, and instructed to take over the observation. Shortly thereafter, petitioner was arrested by Agent Reap (Tr. 1208). A search of petitioner pursuant to the arrest produced an airline ticket stub for petitioner, Shaw and Yancy (Snyder), and their baggage claim tickets (Tr. 1212, 1222). The baggage claim tickets were used to obtain a search warrant for their luggage, which had been sent on to Pasco, Washington. Numerous items, including three loaded handguns and a large

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[1] The majority of the foregoing facts, although not specifically shown to be within the knowledge of the agents who arrested petitioner, were known to the Anchorage F.B.I. office prior to petitioner's arrest (Tr. 456-457, 523, 538, 605, 611, 1075, 1358).

supply of ammunition for each, were found in the luggage (Tr. 1249-1285).

Toward the end of the presentation of the government's case, petitioner objected to the admission of the contents of the luggage on the ground that the arrest had been illegal. The prosecutor contended that the objection was untimely, but made an offer of proof that the arresting F.B.I. agents had information from the Anchorage F.B.I. office that Slack had been involved in a bank robbery. The trial court denied the objection without holding an evidentiary hearing on the issue, ruling that there was "abundant ground" to determine that probable cause existed (Tr. 1297).

1. The objection to the admission of the evidence was not timely. At the time of the trial, Rule 41(e) of the Federal Rules of Criminal Procedure provided that a motion to suppress evidence because of an unlawful search "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."[2] It would thus not have been error for the trial court to deny the objection on this ground. *United States* v. *Dykes,* 460 F. 2d 324 (C.A. 9); *United States* v. *Dittus,* 453 F. 2d 1335 (C.A. 3). Instead, the trial court in its discretion heard the objection but did not order an evidentiary hearing. In this context, the court was entitled to accept the offer of proof by the prosecutor that the agents had been informed

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[2] This section has been revised, effective Oct. 1, 1972. Under the proposed revision to Rule 12, to which the former Rule 41 provisions for suppression motions are to be transferred in modified form, such motions must be made before trial or they will be waived.

by the Anchorage office of the F.B.I. that it had probable cause to believe that Slack had participated in a bank robbery.

Counsel for the petitioner also failed to object to the arrest at the time the baggage claim checks were themselves admitted into evidence (Tr. 1214-1222). This occurred during the testimony of Agent Murphy, who actually conducted the search of petitioner.[3] Because of the untimeliness of the objection, the trial court was entitled to accept the assurances of the prosecutor that the agents were informed that the Anchorage office of the F.B.I. had information constituting probable cause for arrest.

2. The record, including the facts recited above, shows that probable cause for arrest did exist. Because the trial judge did not order an evidentiary hearing on the issue of probable cause for the arrest, the evidence relating to this issue in the record is evidence which was introduced in the course of the trial on the issue of guilt. The ruling of the trial judge, without requiring a separate hearing, that there was "abundant ground" for a finding of probable cause reflects his conclusion on the basis of the substantial evidence before him.

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[3] The impact of the untimeliness of this type of objection in a trial such as this is revealed by information provided to us by A. Lee Peterson, the Assistant United States Attorney who tried the case. He reports that Special Agent Reap, who actually made the arrest, was brought to Anchorage to be available for testimony at the time of trial should the need arise. When the issue of the legality of arrest was not raised at the time the items taken from Slack's person were admitted into evidence, Reap was allowed to return to his duties in Seattle. The issue was then raised the following day, but Agent Reap was not at that time available for testimony in Anchorage.

This was also the conclusion of the court of appeals (Pet. 2a-3a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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